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[REDACTED]

**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

HMO/162244

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**PRELIMINARY RECITALS**

Pursuant to a petition filed November 24, 2014, under Wis. Stat. § 49.45(5)(a), and Wis. Admin. Code § HA 3.03, to review a decision by the Division of Health Care Access and Accountability in regard to Medical Assistance, a hearing was held on December 18, 2014, at Milwaukee, Wisconsin.

The issue for determination whether the petitioner filed her appeal timely.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]

I

Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703

By: Lucy Miller, RN

Division of Health Services  
1 West Wilson Street  
Madison, WI 53701

HMO – Anthem Blue Cross and Blue Shield  
Anthony Otters, MD  
Sheryl Fix, RN  
Decision e-mailed to Kathleen.Kaelin@anthem.com

**ADMINISTRATIVE LAW JUDGE:**

Corinne Balter  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. The petitioner (CARES # [REDACTED]) is a resident of Milwaukee County. The petitioner's HMO for her medical assistance (MA) is Anthem Blue Cross and Blue Shield, hereinafter referred to as Anthem.
2. The petitioner's provider requested approval for a breast lift and implant surgery, and surgery to remove excess skin on the petitioner's arms.
3. On September 8, 2014 Anthem sent the petitioner a letter stating that they did not approve her surgery requests because there was no documentation that the petitioner's doctor had treated her and that were other attempts to solve the petitioner's problems short of surgery.
4. On November 26, 2014 the Division of Hearings and Appeals received the petitioner's request for fair hearing.

### **DISCUSSION**

DHA can only hear cases on the merits if there is jurisdiction to do so. There is no jurisdiction if an appeal is untimely. An appeal concerning MA is untimely if it is not received by DHA within 45 days of the date of the action being appealed. See, 42 C.F.R. § 431.221(d); Wis. Stat. § 49.45(5); Wis. Admin. Code § DHS 104.01(5)(a)3; Wis. Admin. Code § HA 3.05(3). A Hearing request that is not received within the 45-day time period must be dismissed for lack of jurisdiction. Wis. Admin. Code § HA 3.05(4)(e).

In this case Anthem's denial letter, which the petitioner attached to her request for fair hearing is dated September 8, 2014. The letter specifically states, "you have the right to appeal to the State of Wisconsin Division of Hearings and Appeals. [] An appeal must be made no later than 45 days after the date of the action being appealed." The letter is dated September 8, 2014, and the petitioner's appeal request is not post-marked until November 24, 2014. This is well beyond the 45 day limit. I note that the petitioner's fair hearing request is dated October 29, 2014. This is inapplicable, but also beyond the 45 day appeal limit. Therefore, I am without jurisdiction to decide this case. I note that even if I had jurisdiction, I would dismiss the petitioner's appeal.

Under the discretion allowed by Wis. Stat., §49.45(9), the Department now requires MA recipients to participate in HMOs. Wis. Adm. Code, §HFS 104.05(2)(a). MA recipients enrolled in HMOs must receive medical services from the HMOs' providers, except for referrals or emergencies. §HFS 104.05(3).

The criteria for approval by a managed care program contracted with the DHCF are the same as the general MA criteria. See Adm. Code, §HFS 104.05(3), which states that HMO enrollees shall obtain services "paid for by MA" from the HMO's providers. The department must contract with the HMO concerning the specifics of the plan and coverage. Adm. Code, §HFS 104.05(1).

If the enrollee disagrees with any aspect of service delivery provided or arranged by the HMO, the recipient may file a grievance with the department or appeal to the Division of Hearings and Appeals.

Just as with regular MA, when the department denies a grievance from an HMO recipient, the recipient can appeal the department's denial within 45 days. Wis. Stat., §49.45(5), Wis. Adm. Code, §HFS 104.01(5)(a)3.

MA services are covered if they are medically necessary. A service is medically necessary if it is "[r]equired to prevent, identify or treat a recipient's illness, injury or disability..." Wis. Adm. Code, §HFS 101.03(96m)(a).

In this case the petitioner had gastric bypass surgery and lost approximately 200 pounds. The petitioner still weighs approximately 200 pounds. She has maintained her weight and has had other surgeries related to her weight loss. In this particular instance the petitioner's provider requested approval for three procedures. One procedure is for breast implants. Dr. Otter's testimony that this is entirely cosmetic, and would not be covered as medically necessary is credible. This also follows common sense and everyday life experience. The second procedure is for a breast lift. Dr. Otter testified that the medical records do not show that the breast lift is medically necessary. Dr. Otters found it hard to believe that drying agents and other anti-fungal would not be effective in controlling any rash or skin infection under the breasts. Again Dr. Otters' testimony is credible.

The last procedure is for skin reduction on the petitioner's arms. Dr. Otters stated that the petitioner has not shown that this surgery is medically necessary. The petitioner must show that she has tried other treatments that have failed making the surgery necessary. There was no evidence showing that. This is consistent with Dr. Wiggins' letter that notes "there is no documentation of severe recurrent rashes unresponsive to medical therapy or functional impairment from the excess arm tissue."

I note that the petitioner referred to a full body lift in her appeal request, however, those were not the approval codes used for these procedures. If the petitioner is able to provide documentation that she has the skin conditions that she described, which are unresponsive to treatment, her provider can complete a new request.

### **CONCLUSIONS OF LAW**

The undersigned ALJ does not have jurisdiction to decide this appeal because the appeal is untimely.

**THEREFORE, it is**

**ORDERED**

That the petition is dismissed.

### **REQUEST FOR A REHEARING**

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

### **APPEAL TO COURT**

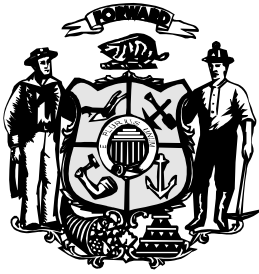
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 14th day of January, 2015

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\sCorinne Balter  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on January 14, 2015.

Division of Health Care Access and Accountability